

To Chairman Genachowski and whomever this may concern at the FCC, You can't afford to be neutral on net neutrality. A recent federal appeals court ruling makes it necessary for the Federal Communications Commission to reassert its authority to maintain net neutrality. Say "net neutrality" to a person, and chances are you'll be rewarded with a quizzical look and a profoundly confused "huh?" Ask folks, however, if they want anyone to restrict the information available on the Internet. Understanding dawns. And that is precisely the issue in net neutrality. A court ruling earlier this month in Comcast vs. Federal Communications Commission significantly curtailed the FCC's ability to insist that all Web content be treated equally. The Web as a virtually unfiltered, unfettered fountain of information is in jeopardy. The question now is whether the companies that own the pipes through which Web content flows will play favorites with lawful content, creating fast lanes or slow lanes for providers depending on ability to pay the toll. That can't be allowed to happen. If there are to be traffic cops on the Web, corporations are not the prime candidates to set the rules of the road. They are driven mostly by profit and, in some cases, motivated in restricting others because, in addition to controlling the pipes, they also are (or can soon be) content competitors. The logical choice for such a regulator is an FCC that operates from the precept that the Web must be free-flowing and be operated neutrally, in the public interest. And the FCC must be given the teeth to enforce this. Imagine if the Googles and Yahoos of the world had to pay to play when they were just getting started. They might not have gotten started. Now, imagine some budding Web entrepreneur or commentator - unburdened from having to construct a building or buy a press - trying to get started today. Remarkably, they still can, adding to the vitality of the Web we know today. The telecom industry insists that they, too, are for net neutrality and have no intention to restrict lawful content on the Web. Or they say they buy into the FCC as a regulator but, essentially, not one that will view them as an indispensable service - much as state Public Service Commissions view electricity or landline phone providers as indispensable utilities. But access to information can properly be viewed as an indispensable service that should enjoy government protection. And "trust us" has its limits, as recent events illustrate about the private sector's trustworthiness in acting in the public interest. In a 2006 editorial on net neutrality, we wrote that Web consumers are best served by a light regulatory touch that allows telecom companies that built the infrastructure a reasonable expectation for returns on their investments. We still believe that. But no regulation at all? And what regulation that does occur dictated de facto by the folks who operate the conduits? No way. What's changed is the Comcast ruling in the U.S. Court of Appeals for the District of Columbia Circuit, which also raises obstacles to administration and FCC efforts to give more Americans access to high-speed Internet. In the wake of that ruling, "trust us" is just not operative. The free market is not as deserving of the demonization it's been getting of late, but neither is it reasonable to conclude that it will do the right thing based purely on loosey-goosey principles mouthed by an FCC that now has limited ability to enforce net neutrality. Understand, we would object as strenuously to a heavy regulatory hand on content by the FCC. But that's not what some FCC commissioners are pitching. They are proposing protecting the content, not restricting it or even giving themselves the power to restrict it. Advocates for net neutrality argue that it is to the Web what the First Amendment is to speech - the opposite of restriction. We agree. What

we're looking for are enforceable rules of the road that foster the free flow of information. Congress can set those rules, but this is the same Congress that routinely waters down legislation when - coincidentally, we're assured - such bills draw the attention of monied interests. The telecoms are such an interest. The FCC could appeal the court ruling, but it has already lost once under the current rules. The answer is new rules. And the FCC is best able to provide these through "reclassification," though we're open to other regulatory frameworks if they can be proven to be as effective. But regulation, nonetheless - maintaining net neutrality. Under the Bush administration, the FCC defined broadband Internet access as an information service. But the FCC has the authority to reclassify or redefine it as a communication service. Though such a move will assuredly attract legal challenge, the courts are less likely to dispute the agency's authority over communication services. The industry argues that such FCC regulation will act as disincentive for it to invest and expand its broadband infrastructure to help bridge the divide between the digital haves and have-nots. And, they argue, that such regulation constitutes unwarranted intrusion on the ability to manage systems. No and no. At the moment, broadband providers act without much competition from other broadband providers. And without this competition - and with already relatively high profit margins - the disincentive to invest already exists. Intrusion in managing its own system? Broadband providers that now encounter congestion slow down the system; what's called "throttling down." And, FCC regulation, is not likely to restrict that. What it will do, however, is enforce neutrality, making it clear that everyone must be throttled down in such circumstances. Broadband providers won't be able to favor one content provider over another. This was the gist of the court case just decided. The FCC called out Comcast for throttling down the file-sharing service, BitTorrent, arguing that it couldn't discriminate in such a fashion. Comcast sued and won. The court ruled, essentially, that the FCC had no authority to enforce net neutrality but left the door open to reclassification. Net neutrality must be preserved. And an FCC - with teeth - is the logical regulator. Writing such rules won't be a cake walk, but we're confident that it can be done - and narrowly applied when necessary - to balance the industry's right to manage networks and recoup investment and users right to an open Web.